



Spokane Tribal Natural Resources

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September 3, 2013

US EPA Region 10
Spokane River NPDES Public Comments
1200 6th Avenue
Suite 900 M/S OWW-130
Seattle, WA 98101

RE: Spokane Tribe of Indians' comments on the Draft NPDES Permits for City Of Coeur d'Alene, City of Post Falls, and Hayden Area Regional Sewer Board (sent first class mail and Nickel.Brian@epa.gov)

Dear Mr. Nickel:

Please accept these comments prepared by the Spokane Tribal Natural Resources Department ("Department") on behalf of the Tribe for the following three draft NPDES Permits: City of Coeur d'Alene (ID-0022853), City of Post Falls (ID-0025852), and Hayden Area Regional Sewer Board (ID-0026590). These comments focus on the changes to the 2007 draft permits that the three permits all share in common. If a comment is specific to a single permit the comment will be identified as such. Otherwise, the comments made apply to all three draft permits.

Additionally, attached to these comments are several documents for the administrative record, including the Tribe's comments (**Attachment A**) prepared by Environmental Stewardship Concepts, LLC on the pre-draft permits shared with the Tribe last fall. The Tribe is incorporating those comments here, and requests that the EPA address them as part of this review.

Comments

1. Polychlorinated Biphenyls- All three permits fail to propose permit conditions numeric or narrative that protect Idaho's,¹ Washington's, or the Spokane Tribe's water quality standards. The following passage from all three fact sheets explains the reasoning for failing to include

¹ As is noted in the fact sheets Idaho's water quality criteria for PCBs in effect under State law is 64 pg/L.

numeric or narrative standards that will protect against discharges that will cause or contribute to water quality standard violations.

Currently, there are insufficient data to determine if the discharges from point sources to the Spokane River in Idaho have the reasonable potential to cause or contribute to excursions above water quality standards for PCBs or dioxin in waters of the State of Washington or the Spokane Tribe of Indians. Therefore, no numeric water quality-based effluent limits are proposed for PCBs or dioxin in the draft permit.

(ID0022853, Fact Sheet at 16, identical in the two other drafts). The Tribe finds this reasoning flawed and requests that the EPA revise the permits to include numeric or narrative standards that will ensure that the discharges from these three facilities do not cause or contribute to the violation of water quality standards, including the Tribe's.

Recently, the Pollution Control Hearings Board in Washington State reviewed similar language and reasoning in the appeal of a permit issued to the Spokane County Regional Water Reclamation Facility (WA-0093317) that discharges into the Spokane River. (**Attachment B, "Order"**). The Board found that information such as the type of plant the applicant is operating; the available dilution, existing data, Washington State's 303d list and fish advisories were adequate to perform the reasonable potential analysis. (Order at p. 21). The Board went on to find that there was a reasonable potential for the discharges of the County Reclamation Facility to cause or contribute to water quality violations. (Order at p. 22).

The Board then stated that "[u]nder the applicable regulations, once it is determined that a reasonable potential exists, the next step is the determination of an effluent limit for PCBs." (Order at p. 22). Further in the Order the Board found that conditions similar to what is stated in these draft permits do not constitute a narrative limit. (Order at 23-24). Specifically, they found language such as reducing PCBs to the "maximum extent practicable" insufficient to qualify as a narrative limit under the Clean Water Act.

The information available to Ecology is equally available to the EPA for performing the reasonable potential analysis, and given the short stretch of the Spokane River that is in Idaho, it is equally applicable. For example, the Washington Department of Ecology's PCB Source Assessment outlines extensive data for the Spokane River.² Additionally, the Washington Department of Health, advises residents of the following: **"Idaho Border to Upriver Dam: Don't eat any fish."**³ Additionally, the Spokane River enters into the Upper Columbia River where there are fish advisories for PCBs in place: **"Fish are nutritious, but certain fish in the Upper Columbia River contain chemicals (mercury and PCBs) that can harm your**

² <https://fortress.wa.gov/ecy/publications/publications/1103013.pdf> (last visited August 27, 2013). The Tribe requests that the entirety of the Source Assessment be incorporated into the Administrative Record for these three draft permits.

³ <http://www.doh.wa.gov/CommunityandEnvironment/Food/Fish/Advisories.aspx#SpokaneRiver> (last visited August 27, 2013). The Tribe requests that all fish advisories for the Spokane River in Washington be incorporated into the Administrative Record for these three draft permits.

health.”⁴ Furthermore, EPA is aware that Tribe’s approved water quality criteria for PCBs is 3.37 pg/L and 0.1ng/g in fish tissue which is significantly lower than either Idaho or Washington, but higher than Oregon’s standard that is also a downstream State in this situation. Finally, Ecology recently stated publically that “[t]he Spokane River is one of the most studied rivers in our state.”⁵ Given all this and more, the EPA has information that is readily available to it, and it must perform the reasonable potential analysis.

Given the short stretch of the Spokane River in Idaho and the data available, once EPA performs the reasonable potential analysis it will likely conclude that the potential for violations exists, and that the current draft permits fail to contain an effluent limit for PCBs. Further, the BMPs outlined in the drafts fail to ensure that discharges will not cause or contribute to water quality violations. For example, all three of these draft permits require the permittee to develop a “Toxics Management Plan (TMP) . . . The goal of the TMP must be to reduce loadings of PCBs and 2,3,7,8 TCDD to the Spokane River to the maximum extent practicable.” (Draft permit ID-0022853 at 31, similar in the other two)(emphasis added). As stated above, the Pollution Control Hearings Board concluded that the “maximum extent practicable” does not meet the requirements of the Clean Water Act. (Order at 23). As is here, if after performing the reasonable potential analysis, the EPA determines that there exists the potential for a violation; the EPA must include an effluent limit for PCB’s. The current language regarding TMPs fails in that regard.

REQUEST

The Tribe requests that EPA perform the reasonable potential analysis and develop an effluent limit for PCBs that meets the requirements of the Clean Water Act. In addition, the EPA should demonstrate and explain how the imposition of such limits will “ensure compliance with the applicable water quality requirements of all affected States.” *See* 40 C.F.R. § 122.4(d).

2. Monitoring- The monitoring should require that the dischargers utilize high volume sampling such as the CLAM methodology when collecting surface water samples for PCBs to increase sensitivity. Additionally, EPA should require within the permits that as new and better testing methods are approved by EPA, those methods are then made a requirement of the permits.

3. Task Force- The Tribe has expressed concern about EPA’s reliance on the Task Force as a means to achieve applicable water quality standards on numerous occasions. (**Attachment C**). In the Spokane River PCB TMDL Stormwater Loading Analysis Final Technical Report a total PCB load reduction of 95% from Idaho was identified as needing to occur to meet the Tribe’s water quality standards for PCBs.⁶

First, EPA has clearly stated that it does not believe that it has the authority to force Idaho dischargers to participate in the Task Force. (**Attachment D and E**). And can only require

⁴ <http://www.doh.wa.gov/Portals/1/Documents/Pubs/334-305.pdf> (last visited August 27, 2013). The Tribe requests that fish advisories for the Upper Columbia River be incorporated into the Administrative Record for these three draft permits.

⁵ <http://www.spokesman.com/stories/2013/aug/24/cleanup-how-far-how-fast/> (last visited August 27, 2013)

⁶ <https://fortress.wa.gov/ecy/publications/publications/0703055.pdf> at page 7. (last visited August 27, 2013). The Tribe requests that the entire report be made part of the Administrative Record for these three draft permits.

participation in the permits by the dischargers agreeing to do so voluntarily. (**Attachment E**). Second, again the Pollution Control Hearings Board, identified the Task Force as a good idea but far too vague to have much effect, and the Tribe agrees with this assessment. (Order at 26). Third and finally, the EPA has presented the Task Force as a way to eventually meet the Tribe's water quality standards. The Tribe fundamentally believes that the decision to attempt to use the Task Force as a means to meet water quality standards is not supportable in law or fact because the Task Force and all of its goals are unenforceable, there is no required funding mechanism, and there are no deadlines to meet any of the amorphous goals. Simply put, the EPA cannot reasonably expect 95-99%⁷ reductions in PCBs through voluntary means alone.

The EPA has the authority to develop a multi-jurisdiction PCB TMDL and this approach could utilize the efforts of the Task Force, but in the end have an enforceable plan to meet water quality standards. Given the complexity of the watershed it will only delay the goals of the Clean Water Act by imposing the Task Force on the Idaho Dischargers without the EPA simultaneously leading a multi-jurisdictional PCB TMDL. EPA is the only entity that can prepare such a PCB TMDL given that Idaho, the Coeur d'Alene Tribe, Washington, the Spokane Tribe, and the Colville Confederated Tribe all assert some jurisdiction over the waters impacted by these discharges of PCBs.⁸

In the end, these permits contemplate 10-year compliance schedules, a multi-jurisdictional PCB TMDL would give the Idaho dischargers regulatory certainty in understanding what the various technologies they are implementing will need to accomplish for PCB removal.

REQUEST

The Tribe requests that the EPA reassess its decision to utilize the Task Force, and instead begin the process of preparing a multi-jurisdictional PCB TMDL.

4. Trust Responsibility- The Tribe has specific rights in the Spokane and Columbia River that are negatively impacted by upstream pollution. The Tribe has unquantified reserved water rights with a priority date of 1877 within the Spokane and Columbia River, which also include a right to water of a quality that can sustain fish and other aquatic life. That right includes the right to safely eat fish in subsistence quantities which currently Tribal members cannot do without risk to their health.⁹ Additionally, the Tribe was granted "paramount use" of a portion of Lake

⁷ 2006 Draft Spokane River PCBs Total Maximum Daily Load Water Quality Improvement Report, p.9. A hard copy will be mailed for inclusion in the Administrative Record for these draft permits.

⁸ EPA has developed guidance and draft guidance on such efforts, and this situation presents a perfect opportunity to exercise the authority EPA has under the Clean Water Act. The Tribe requests that the following guidance and draft guidance be reviewed by EPA and considered in reviewing these draft permits and the Tribe's comments. http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/day3_haire.pdf (last visited August 27, 2013); http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/Draft-MJTMDL_032212.pdf (last visited August 27, 2013); http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/2009_01_09_tmdl_draft_handbook.pdf (last visited August 27, 2013); and http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/pcb_tmdl_handbook.pdf (last visited August 27, 2013). The Tribe requests that the entirety the above guidance and draft guidance be made part of the Administrative Record for these three draft permits.

⁹ Health Consultation: Potential Cumulative Health Effects Associated with Eating Spokane River Fish, August 5, 2011, available at <http://www.doh.wa.gov/Portals/1/Documents/Pubs/334-275.pdf> (last visited August 28, 2013). The Tribe requests that the entirety the above guidance and draft guidance be made part of the Administrative Record for these three draft permits.

Roosevelt for fishing, hunting, and boating after Grand Coulee dam inundated a portion of the Tribe's reservation. 16 U.S.C. § 835d. The Tribe cannot safely and fully exercise these rights if members are unable to safely eat the fish caught.

The federal government is the trustee of the Spokane Tribe's rights, including its fishing rights. *See Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995). This trust responsibility extends "to the federal government as a whole," including EPA. *See id.*¹⁰ Additionally, any agency action that can impact tribal rights and interests is subject to the "United States' fiduciary responsibilities toward the Indian tribes." *See Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981).¹¹ Furthermore, the Indian law canon of statutory construction, derived from the trust relationship, requires the construction of statutes liberally in favor of Indians and resolution of ambiguities in their favor *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). "The trust relationship and its application to all federal agencies that may deal with Indians necessarily requires the application of a similar canon of construction to the interpretation of federal regulations." *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000).

Here, if EPA proceeds to issue these permits substantially unchanged, it will be in violation of its fiduciary duties by failing to protect the Tribe's rights within the Spokane River, guaranteed by Executive Order and Statute, but also by violating its own regulations by issuing permits when "the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." *See* 40 C.F.R. § 122.4(d). Additionally, if EPA proceeds to issue the permits without initiating a multi-jurisdictional PCB TMDL, it will be failing to meet its trust responsibility by relying on the Task Force instead of the statutory authorities it possesses.¹² As one commentator stated this principal succinctly and the Tribe strongly agrees with the statement, "the Agency is bound by the trust responsibility to use its discretion within the statutory regime to protect tribal interests unless doing so conflicts with actual statutory language."¹³ In this situation, protecting the Tribe's rights by requiring PCB limits and beginning a multi-jurisdictional PCB TMDL do not conflict with the Clean Water Act, but are supported by it.

REQUEST

The Tribe requests that EPA review these draft permits for compliance with its statutory duties under the Clean Water Act in light of its trust responsibility to the Spokane Tribe of Indians. Further, EPA should articulate how it is meeting its separate federal common law trust responsibility that is owed to the Spokane Tribe.

¹⁰ *See generally* 1984 EPA Indian Policy, available at <http://www.epa.gov/tp/pdf/indian-policy-84.pdf> (last visited August 28, 2013). The Tribe requests that the entirety of the 1984 EPA Indian Policy be included in the Administrative Record for these three draft permits.

¹¹ *See also HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (holding that EPA "bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction"); *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995) (upholding regulation under Magnuson Act to protect tribal fisheries); *Nw. Sea Farms v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515 (W.D. Wash. 1996) (upholding the Corps' refusal of a permit for a fish farm because it could interfere with treaty fisheries).

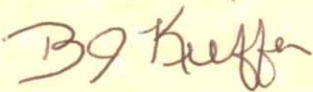
¹² *See* FN 8.

¹³ The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies, Mary Christina Wood, 39 TULSA L. REV 355, 362 (Winter 2003) (citing *N.W. Sea Farms*, 931 F.Supp at 1519-20).

CONCLUSION

The Department understands the difficulties that are presented by addressing toxics within the Spokane River. However, the Clean Water Act has an assortment of regulatory tools and it expects EPA to use all of them at its disposal to meet its requirements under the Act. Furthermore, it expects EPA to meet the requirements of the federal trust responsibility. Another generation of the Tribe's membership cannot have their fishing rights severally impacted by the EPA's regulatory inaction. If you have any questions feel free to contact me at (509) 626-4427.

Sincerely,



B.J. Kieffer
Director
Spokane Tribal Natural Resources Department

Cc: Rudy Peone, Chairman, Spokane Tribal Business Council
Dennis McLerran, Regional Administrator, Region 10, EPA
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